(2)

No. 90-1089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD BRYANT and Wife, JUNETT BRYANT,
Individually and as Next Friends of
DAWN D. BRYANT and KIRT BRYANT, *Petitioners*

v.

WINN-DIXIE STORES, INC.,
WINN-DIXIE HANDYMAN, INC.,
and WINN-DIXIE TEXAS, INC., *Respondents*

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS,
SECOND COURT OF APPEALS DISTRICT,
FORT WORTH, TEXAS

Brief in Opposition to Petition for Writ of Certiorari

SLOAN B. BLAIR*
TOLBERT L. GREENWOOD
MARY COLCHIN JOHNDROE

CANTEY & HANGER
801 Cherry Street, Suite 2100
Fort Worth, Texas 76102
(817) 877-2800
FAX (817) 877-2807

**Counsel of Record for Respondents*

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

I. RESPONSE TO QUESTIONS PRESENTED

1. Does the holding of the Court of Appeals of Texas, Second Judicial District, Fort Worth, Texas, in *Bryant, et al. v. Winn-Dixie Stores, Inc., et al.*, 786 S.W.2d 547 (Tex. App.–Fort Worth 1990, writ denied) conflict with the intent of Congress or with the interpretation of 18 U.S.C. § 922(a)(6) by this Court in *Huddleston v. United States*, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974)?

2. Petitioners' second question presented is nonsensical, apparently with critical language omitted and, therefore, cannot be responded to.

II. LIST OF ALL PARTIES

The following are parties to this case:

Donald Bryant and Wife, Junett Bryant, Individually, and as Next Friends of Dawn Dee Bryant and Kirt Bryant ("BRYANTS")

Winn-Dixie Stores, Inc., Winn-Dixie Handyman, Inc., and Winn-Dixie Texas, Inc. ("WINN-DIXIE")

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BRYANTS affixed reprinted versions of the Opinion of the Court of Appeals for the Second Supreme Judicial District, Fort Worth, Texas, *Bryant, et al. v. Winn-Dixie Stores, Inc., et al.*, 786 S.W.2d 547 (Tex. App. – Fort Worth 1990, writ denied), denial of review by the Supreme Court of Texas and denial of BRYANTS' motion for rehearing of the application for writ of error (*See*, Petition for Writ of Certiorari, Appendices A, B and C).

However, BRYANTS represented to this Court that the trial court granted WINN-DIXIE's Motions for Summary Judgment without opinion. This is not wholly accurate as the 17th District Court of Tarrant County, Texas rendered a written Order Granting Motions for Summary Judgment and Amended Motions for Summary Judgment and Severance of Defendants Winn-Dixie Stores, Inc., Winn-Dixie Handyman, Inc. and Winn-Dixie Texas, Inc. ("Order Granting Motions for Summary Judgment") in favor of WINN-DIXIE in Cause No. 17-117421-88 on December 8, 1988. A copy of the Order Granting Motions for Summary Judgment is reprinted at Appendix "A" hereto, p. A-1.

VI. OBJECTIONS TO JURISDICTION

1. No Ground Under 28 U.S.C. § 1257(a)

BRYANTS seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a) by merely referencing the citation to this statute. BRYANTS do not elaborate as to which ground under 28 U.S.C. § 1257(a) might be applicable to this case. Perhaps because none is.

There is no treaty or statute of the United States, or statute of any state, the validity of which has been drawn in question. There has been no Constitutional challenge. Further, there is no claim to any title, right, privilege, or immunity under the Constitution, treaties or statutes of the United States. Rather, BRYANTS have attempted to assert a Texas state

common law cause of action, sounding in negligence *per se*, with the applicable standard of care determined by a federal statute, i.e., 18 U.S.C. § 922(d). Thus, any right claimed herein arises from Texas state common law.

2. BRYANTS Seek an Advisory Opinion

As BRYANTS are seemingly well aware, their request that this Court review the interpretations of the Courts below of 18 U.S.C. § 922(d) is a request that this Court render an advisory opinion. In this connection, regardless of this Court's interpretation of 18 U.S.C. § 922(d), and even if this Court, by its construction, found a duty which WINN-DIXIE breached, the summary judgment rendered by the 17th District Court of Tarrant County, Texas, would still stand in favor of WINN-DIXIE.

The Order Granting Motions for Summary Judgment expressly granted these motions upon each and every ground stated in the motions. [TR. pp. 246-247]. These grounds included that, as a matter of law, WINN-DIXIE was not negligent in the sale of ammunition to Larry Keith Robison ("Robison") and that the sole cause of the death of Rickey Lee Bryant was the intervening criminal acts or omissions of another. [TR. pp. 51-64]. BRYANTS acknowledged the holding of the 17th District Court in WINN-DIXIE's favor on the element of proximate cause by BRYANTS' Point of Error IV in their Brief for Appellants, submitted to the Court of Appeals in Cause No. 02-88-269-CV. Although BRYANTS purport to give this Court a Statement of the Points of Error from BRYANTS' Brief in the Court of Appeals at Appendix E to BRYANTS' Petition for Writ of Certiorari, BRYANTS failed to include their Point of Error IV in this Statement, which is as follows:

> THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BY FINDING, AS A MATTER OF LAW, THAT THE ACT OF MURDER, BY LARRY KEITH

ROBISON, WAS THE SOLE PROXIMATE CAUSE OF RICKEY LEE BRYANT'S DEATH WHICH THUS BROKE THE CAUSAL CONNECTION OF THE SALE OF AMMUNITION TO A CONVICTED FELON.

The Court of Appeals, having upheld the 17th District Court's ruling as to duty and breach of duty, found it unnecessary to discuss BRYANTS' Point of Error IV concerning proximate cause. (*See*, Petition for Writ of Certiorari, Appendix A, p. A-15.) BRYANTS did not re-urge their Point of Error IV before the Court of Appeals. Likewise, BRYANTS did not request any point before the Supreme Court of Texas on the sole proximate cause finding of the 17th District Court.

Contrarily, WINN-DIXIE did preserve and urge this point before the Supreme Court of Texas in WINN-DIXIE's Cross-Point One, which states:

THE DISTRICT COURT CORRECTLY GRANTED WINN-DIXIE'S MOTION AND AMENDED MOTIONS FOR SUMMARY JUDGMENT BY FINDING, AS A MATTER OF LAW, THAT THE SOLE CAUSE OF THE DEATH OF RICKEY LEE BRYANT WAS THE INTERVENING ACTS OR OMISSIONS OF SOMEONE OR SOMETHING OTHER THAN WINN-DIXIE.

A finding of negligence *per se* would only determine the elements of duty and breach. It would not establish liability because, in addition, for any liability to attach, such negligence must be a proximate cause of the injury or damages. *Missouri Pacific Railroad Company v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977). Accordingly, even if this Court were to determine that WINN-DIXIE was negligent *per se* in the sale of ammunition to Robison, the final summary judgment of the 17th District Court as to sole proximate cause would necessitate that judgment in favor of WINN-DIXIE still stand.

The United States Supreme Court's power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights; the power is to correct wrong judgments, not to revise opinions, and the Court is not permitted to render an advisory opinion. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 566, 97 S.Ct. 2849, 53 L.Ed.2d 965, 970 (1977); *Fay v. Noia*, 372 U.S. 391, 430 n.40, 83 S.Ct. 822, 9 L.Ed.2d 837, 863-864. The United States Supreme Court is not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court, after the United States Supreme Court corrected the state court's views of federal laws, the United States Supreme Court review could amount to nothing more than an advisory opinion. *Id.*

VII. STATEMENT OF THE CASE

1. Introduction

It is true that Rickey Lee Bryant, together with four other people, was murdered on August 10, 1982, by Robison. It is also true that Robison purchased some .22 caliber rimfire ammunition from WINN-DIXIE on August 10, 1982; however, there is no evidence in the record to show whether or not this same ammunition was used in the murders. Likewise, it is also true that Robison had been convicted of a felony approximately five (5) years before the sale.

2. WINN-DIXIE Did Not Breach Any Duty Owed Under the Circumstances of this Case

BRYANTS have alleged that WINN-DIXIE violated the Federal Firearms Control Act, 18 U.S.C. § 922(d), by selling the .22 caliber rimfire ammunition to Robison, solely because of Robison's prior felony conviction. However, 18 U.S.C. § 922(d) only makes it unlawful to sell ammunition to a person *knowing or having reasonable cause to believe* that such person has been convicted of a crime punishable by imprisonment for a term exceeding one year.

The fact that Robison had been convicted of a felony approximately five (5) years before the sale, standing alone, presents no evidence to support the speculative assumption that WINN-DIXIE *knew or had reasonable cause to believe* that Robison was a convicted felon at the time of the ammunition sale. In fact, the only evidence on point before this Court negates any such knowledge or reasonable cause to believe. This evidence is discussed later in this Brief.

BRYANTS make much ado of an inference supposedly stemming from John Schwabauer, an employee of WINN-DIXIE in 1982, but retired at the time of giving his Affidavit and deposition, who sold the ammunition to Robison, not specifying in a deposition (after being asked for "kind of a summary of what those verbal instructions consisted of") that he knew, or was formally instructed, that a felony conviction disqualified a person from purchasing ammunition under the Federal Firearms Control Act. [TR. pp. 163-166]. However, the only evidence in the record before this Court, directly on point, is contained in the Affidavit of John Schwabauer, wherein he stated:

> I knew, and all other employees in Store No. 9410 who sold ammunition knew, that we were not to sell ammunition to any person that we had any reason to believe had been indicted or convicted of a crime or who was an unlawful user of drugs or who displayed some type of mental problem, or that gave the appearance of being intoxicated by any substance. Generally, employees were briefed on these procedures at the time they were hired. All employees working at Store No. 9410 in August of 1982 were aware of these procedures for ammunition sales and followed these procedures. [TR. p. 49].

BRYANTS have never articulated in the Courts below, nor do they now, what "duty" they claim WINN-DIXIE had that was supposedly breached, or how this amorphous, undefined "duty" was breached. The closest BRYANTS have come to describing this "duty" is to state that WINN-DIXIE had a

"duty" to cooperate in the enforcement of the Federal Firearms Control Act to a greater extent than is indicated by the deposition testimony of John Schwabauer, the former employee of WINN-DIXIE, who sold the ammunition to Robison. [TR. pp. 145-150].

Apparently, BRYANTS are attempting to argue that WINN-DIXIE had a "duty," stemming indirectly from 18 U.S.C. § 922(d), to provide some type of formal training, above and beyond the briefing procedures described by Mr. Schwabauer in his Affidavit and deposition, as to how to spot a person who has been convicted of a felony. Alternatively, BRYANTS seem to be arguing that WINN-DIXIE had a "duty" under 18 U.S.C. § 922(d) to investigate and determine that Robison had a past criminal record, regardless that no special circumstances or dangers were presented at the time of the ammunition sale.

BRYANTS argue that WINN-DIXIE should have made inquiry into the past criminal record of Robison as such information was "readily available" by a simple telephone call to the Tarrant County Criminal District Clerk's office, which would have taken "less than one minute." [TR. p. 2]. The evidence in the record and the law on point shows this argument is untenable.

The Affidavit of Joyce Reddy, Supervisor of the Firearms and Licensing Section, Compliance Operations, Bureau of Alcohol, Tobacco and Firearms, shows that, as of January 1, 1983, there were 531 licensed firearms dealers in Tarrant County, Texas, authorized to sell ammunition. [TR. p. 65]. E. P. "Winn" Heinrich, Controller of WINN-DIXIE and custodian of ammunition sales records for various stores, testified that there were approximately 21 ammunition sales made, per month, at WINN-DIXIE stores in 1982. [TR. pp. 66-96].

If every one of the 531 licensed dealers had to call the Tarrant County Criminal District Clerk's office regarding a comparable number of ammunition sales transactions, resulting in

approximately 372 calls per day, the Criminal District Clerk's office simply could not have handled the inquiries.

Stella Davis, the Chief Criminal District Clerk for Tarrant County, Texas, testified that "it would not have been feasible in 1982 . . . to handle even (a) 100 such additional calls per day." [TR. p. 46]. Stella Davis further testified that, in 1982, an employee would have had to respond to such a call by manually looking through the books, as only pending cases were stored on a computer. Therefore, each such call inquiring about a potential criminal record could take a great deal of time, dependent on how many years back the employees of the Criminal District Clerk's office were required to search. [TR. p. 46].

Moreover, BRYANTS suggest no limits to this supposed "duty" of investigation and inquiry. To how many County Criminal District Clerk's offices would BRYANTS require such contacts be made? How many various state and federal offices would these inquiries encompass? How would one inquire on courthouse holidays, weekends or after hours?

3. BRYANTS Have Misstated the Holdings of the Courts Below

BRYANTS state that the trial court found, as a matter of law, no duty to inquire of disqualifying factors under 18 U.S.C. § 922(d), regardless of the circumstances surrounding an ammunition sale. BRYANTS further indicate that this is the holding of the Court of Appeals and of the Supreme Court of Texas. These representations are not accurate.

Rather, the Courts below held that, in the particular circumstances surrounding the sale of the .22 caliber rimfire ammunition to Robison, there was, as a matter of law, no duty of further inquiry, above and beyond the requirements set forth by applicable statutes, codes, regulations and case law, because there were no special manifest circumstances or dangers which might have put WINN-DIXIE on notice, or given WINN-DIXIE reasonable cause to believe, that Robison was

a convicted felon, or that there was any other reason why Robison should not have been sold the ammunition. As stated in the Opinion of the Court of Appeals:

> However, a fair reading of this statute does not indicate that it gives rise to strict liability. *See*, 18 U.S.C.A. § 921 *et seq.* A violation under this statute requires the seller to know or have reasonable cause to believe that the person to whom he is about to sell a firearm or ammunition fits into one of the four categories specifically set out by the Act. It is here that this court and appellants disagree. There is nothing in this statute which indicates a duty of inquiry on the part of the seller. *See*, 18 U.S.C.A. § 921 *et seq.* The only evidence presented to the trial court at the summary judgment hearing with regard to what appellees' employee knew or had reasonable cause to believe came from the Affidavit of the clerk who sold the ammunition and also this clerk's deposition testimony.
>
> The affidavit and deposition of the store clerk indicate that he recalls selling the ammunition to the assailant. He testified that the assailant did not appear unusual or remarkable in any way. We think it is reasonable that the trial court made no finding that the duty of ordinary care did not exist, rather they found there was no breach of the duty of ordinary care.
>
> * * *
>
> We hold, in view of the summary judgment evidence, taken in the light most favorable to appellants, it is unreasonable for appellants to suggest that the trial court held, as a matter of law, that no duty exists on the part of the seller of ammunition to use ordinary care. We think the record more reasonably indicates the court found a duty, and found that the duty had not been violated.

Bryant, et al. v. Winn-Dixie Stores, Inc., et al., 786 S.W.2d 547, 548-9 (Tex. App. – Fort Worth 1990, writ denied).

VIII. NO SPECIAL OR IMPORTANT REASON FOR GRANTING WRIT

1. BRYANTS Have Misstated the Holding of the Court of Appeals

BRYANTS allege two reasons for this Court to grant BRYANTS' Petition for Writ of Certiorari. First, BRYANTS represent that they "believe" that the holding of the Court of Appeals is contrary to the Congressional intent of the Federal Firearms Control Act. BRYANTS argue that the holding of the Court of Appeals would permit ammunition dealers to "look the other way," and that it promotes "willful blindness" in firearms transactions, allowing dealers to make absolutely no inquiry as to whether a potential purchaser might fall within one of the four categories set out in 18 U.S.C. § 922(d), regardless of the circumstances surrounding the sales transaction.

As mentioned above, BRYANTS have misstated the holdings of the Courts below. As assessed by the Court of Appeals, BRYANTS have sought, throughout these proceedings, and now seek, a ruling that, as a matter of law, any duty in connection with the sale of ammunition carries with it some type of automatic "duty" to investigate the potential past criminal record of a purchaser, even absent any special circumstances or dangers presented at the time of the ammunition sale. The Court of Appeals declined to make such a ruling. *Bryant*, 786 S.W.2d at 548.

The Court of Appeals held that a fair reading of 18 U.S.C. § 922(d) does not indicate that the statute gives rise to strict liability but that, rather, a violation would require a seller to *know or have reasonable cause to believe* that the person to whom he is about to sell ammunition fits into one of the four categories specifically set out in the statute. *Id.* The Court of

Appeals further held that, based on the evidence in the record, as a matter of law, WINN-DIXIE did not know or have reasonable cause to believe that Robison fell within one of the four categories set out in 18 U.S.C. § 922(d). *Id.* Thus, the true holding of the Court of Appeals was that WINN-DIXIE had no obligation to investigate Robison's potential past criminal history under the circumstances presented in this case.

2. WINN-DIXIE Complied With 18 U.S.C. § 922(d)

The Federal Firearms Control Act, 18 U.S.C. § 922(d), only makes it unlawful for a licensed dealer to sell ammunition to a person when the dealer *knows or has reasonable cause to believe* that such person has been convicted of a crime punishable by imprisonment for a term exceeding one year. The fact that Robison had been convicted of a felony approximately five years before WINN-DIXIE sold him the .22 caliber rimfire ammunition does not, in and of itself, show that WINN-DIXIE *knew or had reasonable cause to believe* that Robison was a convicted felon, or any other reason that Robison should not be sold the ammunition.

In fact, the only evidence on point in the record negates any such knowledge or reasonable cause to believe. It includes the Affidavit of John Schwabauer, at paragraph 3 on page 2, wherein Mr. Schwabauer states:

> To the best of my knowledge, I had never seen Larry Keith Robison before the time of the afore-mentioned purchase. I had no reason of any kind to know that he had been convicted of any type of crime or that he had any type of criminal record. [TR. p. 49].

Further, in Mr. Schwabauer's Affidavit, as well as in his deposition, he stated that there was nothing unusual about Robison's appearance or behavior at the time of the ammunition sale. [TR. pp. 49, 171; Schwabauer Depo., p. 21].

Likewise, Billy Sampson, the employee of Camp Bowie Pawn Shop, which sold a gun to Robison approximately one week before WINN-DIXIE sold ammunition to him, testified that, at the time of the sale of the gun, Robison filled out the form required for purchase of a firearm, Form 4473, certifying that he had never been convicted of a felony. Sampson also testified that there was no indication whatsoever that there was anything wrong with Robison, mentally or emotionally, or that he was intoxicated or under the influence of any narcotic or drug at the time of the purchase. [TR. pp. 235-7; Sampson Depo., pp. 13-15].

In fact, the very people who filed this Petition for Writ of Certiorari, and who had welcomed Robison into their home on several occasions, knowing that Robison was a close companion to their son, Rickey Lee Bryant, have admitted that Robison appeared normal and ordinary.

Donald Bryant, one of the Petitioners herein, testified that there was nothing suspicious or unusual about Robison, that Robison appeared clean shaven, an ordinarily-groomed man, that he had no qualms or reservations about letting Robison into his home, and that he was not, for any reason, afraid, scared, or concerned about Robison. [TR. p. 231; Donald Bryant Depo., p. 16].

Similarly, Junett Bryant, another one of the Petitioners herein, testified that Robison seemed to be just an average, ordinary person, who did not appear to have anything wrong with him, who gave no indication that he was a person that had any trouble with the law, who gave no indication that he was a drug user, who gave no indication that he might have a drinking problem and who did not appear to be mentally unstable or emotionally disturbed. [TR. pp. 228-9; Junett Bryant Depo., pp. 43-44].

3. WINN-DIXIE Complied With All Recording Requirements

In addition to the requirements set forth in 18 U.S.C. § 922(d), there were certain recording requirements effective

in August of 1982, the time of the ammunition sale, relating to ammunition sales. Until December of 1982, the U.S. Code stated that it was unlawful for any licensed dealer to sell ammunition to a person unless a record was kept of the purchaser's name, age and place of residence. 18 U.S.C. § 992(b)(5) (1976). This section of the U.S. Code was amended in December of 1982 and currently provides that if the ammunition to be purchased is .22 caliber rimfire ammunition, record keeping is unnecessary. 18 U.S.C. § 922(b)(5) (Supp. 1986).

Similarly, § 923(g) of the U.S. Code required all licensed dealers who sold ammunition to maintain such records as prescribed by the Treasury Secretary, prior to December of 1982. However, this section of the U.S. Code was amended in December of 1982, and now .22 caliber rimfire ammunition is excluded from the prescribed regulations. 18 U.S.C. § 923(g) (1976 and Supp. 1986).

The legislative history of these particular provisions reveals the rationale for amending the two (2) recordation sections of the U.S. Code. The Senate Committee reported that to insist on the recording of .22 caliber rimfire ammunition was an "enormous and unnecessary administrative burden on the Treasury Department, on firearm dealers, and on the nation's sportsmen who purchase this type of ammunition." Furthermore, the report states that these requirements do not increase public safety. S. REP. NO. 428, 91st Cong., 1st Sess., *reprinted in*, 1969 U.S. CODE CONG. & ADMIN. NEWS 1322, 1347.

The Code of Federal Regulations also explicitly provides for recordation of ammunition sales. The present Code provides an exception to the recording of sales for .22 caliber rimfire ammunition. 27 C.F.R. § 178.125(c) (1985). This differs from the regulations effective in August of 1982, which directed that sales of ammunition of .22 caliber rimfire ammunition be recorded. 27 C.F.R. § 178.125(c) (1982).

Thus, although under current statutes, codes and regulations, WINN-DIXIE would have no duty to record any information regarding the ammunition sale to Robison, they were required, in August of 1982, to record some basic information. This information included the purchaser's name, address, date of birth, date of transaction, name of the manufacturer, caliber or gauge, quantity of ammunition and the method used to establish the identity of the purchaser. 27 C.F.R. § 178.125(c) (1982).

The uncontroverted evidence in the record, including the Affidavit of John Schwabauer and Mr. Schwabauer's deposition, *conclusively establish that WINN-DIXIE wholly complied with the aforementioned applicable recording requirements.* Exhibit "1" attached to Mr. Schwabauer's deposition, the ammunition form, filled out at the time of the ammunition sale to Robison, shows that all pertinent information was recorded. [TR. p. 199; Schwabauer Depo., Exhibit 1]. Mr. Schwabauer testified that he recorded this information from a valid, unexpired Texas driver's license presented by Robison. [TR. pp. 176 and 199; Schwabauer Depo., p. 26 and Exhibit 1].

For purposes of clarification, it should be emphasized that the recording requirements for the sale of firearms differ from ammunition sales requirements. A dealer of firearms may not sell any firearm to a person unless he records the transaction on a Firearms Transaction Record, Form 4473. 27 C.F.R. § 178.124(a) (1982).

Form 4473 shows the name, address, date, place of birth, height, weight and race of the purchaser and includes an executed certification by the purchaser that he/she is not prohibited from receiving a firearm; i.e., that he/she is not a convicted felon, a fugitive from justice, a drug user, and has not been adjudicated a mental defective or committed to a mental institution. 27 C.F.R. § 178.124(c) (1982). There is no such requirement for a seller of ammunition.

4. No Duty Beyond Compliance With All Applicable Statutes, Regulations, and Codes Absent Special Circumstances

When a legislature has enacted regulations which define the standard of care to be exercised in a firearms transaction, compliance with the regulations normally absolves an individual or entity of any need to take additional precautions absent special circumstances or dangers. *Heatherton v. Sears, Roebuck & Company*, 593 F.2d 526 (3rd Cir. 1979), *aff'd*, 652 F.2d 1152 (3rd Cir. 1981), *citing*, Prosser, *Handbook on the Law of Torts*, § 36 (4th ed. 1976). In *Heatherton*, the firearms purchaser had a prior felony conviction but this, in and of itself, was not sufficient to impose some higher investigative "duty."

In *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841 (Tex. App. – San Antonio 1989, writ denied), also a summary judgment proceeding, the appellate court entertained the suggestion of a common law negligence action brought by the heirs of a person who was shot and killed against the seller of the handgun used in the shooting. As a threshold inquiry, the appellate court considered whether there was the existence and violation of any duty owed to the heirs, such to establish liability in tort. *Peek*, 768 S.W.2d at 846. Noting that duty is the function of several interrelated factors, the foremost consideration being foreseeability of the risk, the appellate court emphasized that:

> "One is not bound to anticipate negligent or unlawful conduct on the part of another." (cites omitted).

Id.

In *Peek* the purchaser of the handgun had past mental problems and there was summary judgment evidence in the record that, at the time of the sale, the purchaser appeared to be nervous, uptight and in a hurry. The appellate court held that, under the circumstances of the case, there was, as a matter of law, no reason for the firearms seller to anticipate an insane or criminal act of violence on the part of the purchaser and, therefore, the seller did not breach any duty of reasonable

care. *Peek*, 768 S.W.2d at 847. The appellate court stated that only if a prospective purchaser's manifest behavior or comportment were such that the ordinary observer would be put on notice that the purchaser, if possessed of a firearm, should foreseeably pose a danger to third persons, might liability be supportable. *Id.*

Further, BRYANTS' reliance on this Court's opinion in *Huddleston v. United States*, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974) is misplaced. The Legislative history quoted by BRYANTS from *Huddleston* does not, in any way, suggest the creation of any type of "duty" above and beyond compliance with applicable statutes, codes and laws, absent special circumstances or dangers surrounding a transaction. Specifically, *Huddleston* dealt with the question of whether the "acquisition" of a firearm included pawn shop redemptions, such that a firearm purchaser who knowingly made a false statement in connection with the "acquisition" of a firearm, intended or likely to deceive the seller as to any fact material to the legality of the sale, could be convicted. Thus, *Huddleston* is not relevant to the case at bar.

5. Holding of the Court of Appeals Is Not In Conflict With Any Other Decision

Second, BRYANTS allege that the holding of the Court of Appeals is in conflict with the decisions of "virtually every state court of last resort that has considered the matter" and with the decisions of the United States Courts of Appeals. This, too, is incorrect.

One such opinion supposedly in conflict is *Heatherton*, 593 F.2d 526. In *Heatherton*, as in the case at bar, the purchaser had a prior felony conviction. However, the fact of a prior felony conviction, in and of itself, did not create the special circumstances which would be necessary to impose some type of higher duty to do more than comply with the applicable statutes, codes and regulations.

BRYANTS further cite this Court to the case of *Phillips v. Roy*, 431 So.2d 849 (La.App.–2nd Cir. 1983). In fact, the *Phillips* case sets forth the type of evidence which BRYANTS should have submitted, had it been available, to oppose WINN-DIXIE's Motion and Amended Motions for Summary Judgment.

In *Phillips*, it was alleged that the store employee who sold a .357 Magnum pistol, either *knew or should have known* that the purchaser was mentally incompetent. *Phillips*, 431 So.2d at 851. The appellate court held that a material fact as to the purchaser's demeanor and conduct when he purchased the pistol existed, such that the salesperson should have been alerted to his mental incompetence, in view of certain deposition testimony offered in connection with the response to the motion for summary judgment. *Phillips*, 431 So.2d at 852. This deposition testimony included testimony from the purchaser's minor daughter and mother, stating that the purchaser appeared (by physical demeanor and conduct) to be mentally disturbed when he left his home on the morning of the purchase and subsequent shooting incident. *Id.*

The daughter stated that her father was yelling and cursing, and insisted that her little puppy be killed simply because the puppy was black, and that the child attempted to contact a friend on the police force to look for her father later that morning. The girl testified that she believed that anyone who observed her father on the morning of the homicide would have concluded there was something wrong with him. *Id.*

The purchaser's mother gave a history of her son's persistent bouts with mental illness over the past years and testified that her son's institutionalization in a state hospital on five (5) separate occasions was information widely known by people in the area and, specifically, that the owner of the store which sold the firearm to her son was aware of it. Further, the mother testified that on the morning of the incident, just a couple of hours before her son purchased the weapon, her son's mind was obviously drifting. Her concern was so intense

that she telephoned a local judge to request confinement of her son in jail pending another commitment to the state hospital. *Id.*

If there were, in fact, any indication of special circumstances or dangers which might have given WINN-DIXIE reasonable cause to believe that Robison was a convicted felon, or that there was some other reason why he should not have been sold the ammunition, BRYANTS should have submitted summary judgment evidence to show those circumstances and thereby rebut the summary judgment proof of WINN-DIXIE. However, they did not.

The case of *Love v. Zales Corp., Inc.*, 689 S.W.2d 282 (Tex. App. – Eastland 1985, writ ref'd n.r.e.) is clearly distinguishable from the case at bar. In *Love*, the purchase was of a Winchester shotgun, not .22 caliber rimfire ammunition. As aforementioned, different recording requirements apply in the case of a firearm sale as opposed to an ammunition sale. Moreover, in *Love*, the purchaser filled out the Firearms Transaction Record, Form 4473, required for firearm sales, stating that he had been committed to a mental institution. Nonetheless, the salesclerk sold the firearm anyway, despite *knowing* that the purchaser had been committed to a mental institution.

In *Cullum & Boren-McCain Mall v. Peacock*, 592 S.W.2d 442 (Ark. 1980), the Supreme Court of Arkansas was dealing with the question of whether the trial court should have granted a directed verdict, i.e., whether there was no evidence regarding negligence in the case. The Court held that the case should be reversed and remanded for a new trial because whether the store was negligent in selling a .38 pistol was a question for the jury since there was evidence submitted at trial that the purchaser had requested a weapon which would "blow a big hole in a man." Additionally, evidence was submitted at trial that the seller's employees were suspicious of the purchaser throughout the sales transaction. The evidence showed that one employee had asked another to check the purchaser out by observation and by conversations with

the purchaser. Thus, in *Peacock*, as in the *Phillips* case, evidence was admitted showing that there were special circumstances or dangers surrounding the sales transaction.

In *Franco v. Bunyard*, 547 S.W.2d 91 (Ark. 1977), again, the case dealt with a firearm, not ammunition sales transaction, in which the seller was not even in token compliance with the law. The evidence showed that, despite having no identification and no money, after writing a hot check, the purchaser was allowed to leave the store with a pistol without even signing the required Form 4473. *Franco*, 547 S.W.2d at 93. According to the salesclerk, the Form 4473 was not filled out until the following day, after the sales transaction and after it was learned that the store had been duped. *Id.*

In *K-Mart Enterprises of Florida, Inc. v. Keller*, 439 So.2d 283 (Fla.App.–3rd Dist. 1983), also dealing with a firearm and not an ammunition sales transaction, the retail clerk, once again, failed to get the information from the purchaser to fill out the required Firearms Transaction Record, Form 4473. The seller did not even try to dispute that it was negligent *per se* in its sale of the .30-.30 rifle. Moreover, there was evidence admitted that if the purchaser had been asked, he would have truthfully responded that he was the subject of a felony information and was a user of marijuana.

As has been previously described, the recording requirements regarding firearms transactions are different from those for ammunition sales. The seller of a firearm is and was, in August of 1982, required to ask the purchaser whether or not they have been convicted of a felony, whether they are a drug user . . . and to get the purchaser to certify, in writing, that they have not been so convicted, do not use drugs . . . . There is, and was, no such requirement for an ammunition sale.

In the case at bar, Robison had earlier filled out the form required for a purchase of a firearm, Form 4473, certifying that he had never been convicted of a felony. [TR. pp. 235-7]. Thus, there is evidence in the record that Robison was asked

for this information at the time of the sale of a firearm, about one week before the sale of the ammunition by WINN-DIXIE, but lied. It is incredible to suppose that had Robison been asked the same information approximately one week later, at the time of the ammunition sale by WINN-DIXIE, he would have told the truth about his prior felony conviction.

BRYANTS also cite this Court to the case of *Decker v. Gibson Products Company of Albany, Inc.*, 679 F.2d 212 (11th Cir. 1982). Again, *Decker* deals with a firearm transaction in which the evidence showed that before buying a .38 caliber pistol, the purchaser informed the salesperson that the purchaser had been convicted of the felony of aggravated assault. It was uncontroverted that the sale of the handgun actually did violate 18 U.S.C. § 922(d), as the purchaser was *known* to be a convicted felon at the time of the firearm sale.

Next, BRYANTS cite *Howard Brothers of Phenix City, Inc. v. Penley*, 492 So.2d 965 (Miss. 1986) as an opinion supposedly in conflict with the opinion of the Court of Appeals in this case. Again, this representation by BRYANTS is inaccurate, as *Howard Brothers* is easily distinguishable from the case at bar. In *Howard Brothers* a department store was sued by a 70 year old man who was taken hostage in the department store, by a mentally deranged person, who was voluntarily handed a .357 caliber Magnum pistol, concurrently with the bullets for it, by the store's clerk. The assailant then loaded the revolver inside the store and, subsequently, took his hostage. The assailant had been in a mental institution in Louisiana and had been a patient in the Mississippi State Hospital on two (2) occasions. *Howard Brothers*, 492 So.2d at 966.

Additionally, the assailant had spent the previous night with a friend drinking, and taking "black mollies" and Valium. The assailant testified that, on the morning of the incident in question, he and his friend awoke around 7:00 o'clock, and he drank several drinks of whiskey and took about three (3) each of "black mollies" and Valium. The assailant testified that he was high at the time of the incident. *Id.*

Moreover, the evidence showed that the salesclerk made no attempt to comply with state and federal statutes. The salesclerk delivered a pistol to the assailant, who was a minor, without any attempt to ascertain his age, as well as to a mental cripple, who was high on alcohol and drugs at the time. *Howard Brothers*, 492 So.2d at 968. The Court held that a dealer in firearms should have in effect in his business some safeguard to see that a loaded handgun is not placed in the hands of an unknown person, at the dealer's place of business, unless or until the person's background could be thoroughly investigated. *Howard Brothers*, 492 So.2d at 969.

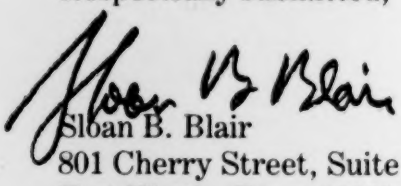
Lastly, BRYANTS cite this Court to several cases interpreting "knowing or having reasonable cause to believe" language, or similar language, found in statutes other than 18 U.S.C. § 922(d). None of these cases, cited by BRYANTS at pages 26 through 28 of their Petition for Writ of Certiorari, construe 18 U.S.C. § 922(d), the statute relevant in the case at bar.

Nonetheless, BRYANTS point out that similar language to the "knowing or having reasonable cause to believe" language, used in other statutes, has been construed to mean that one cannot intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate. (*See*, Petition for Writ of Certiorari, pp. 27-28 and cases cited therein.) This is exactly the point. The evidence of record in this case showed that there were no manifest special circumstances or facts which might have given WINN-DIXIE reasonable cause to believe, or might have prompted WINN-DIXIE to investigate.

IX. PRAYER

Wherefore, WINN-DIXIE prays that this Court deny BRYANTS' Petition for Writ of Certiorari and, alternatively, that this Court affirm the judgment of the Court of Appeals. WINN-DIXIE further prays that they recover their costs and for such other and further relief to which they may be entitled.

Respectfully submitted,



Sloan B. Blair
801 Cherry Street, Suite 2100
Fort Worth, Texas 76102
(817) 877-2800
FAX (817) 877-2807

Counsel of Record
for Respondents

Tolbert L. Greenwood
Mary Colchin Johndroe
CANTEY & HANGER
801 Cherry Street, Suite 2100
Fort Worth, Texas 76102
(817) 877-2800
FAX (817) 877-2807

Additional Counsel
for Respondents

[Signed 12-8-88]

APPENDIX A

IN THE DISTRICT COURT
TARRANT COUNTY, TEXAS
17TH JUDICIAL DISTRICT

No. 17-85335-84

DONALD BRYANT and Wife, JUNETT BRYANT,
Individually and as Next Friend of
DAWN DEE BRYANT, a Minor, and
KIRT BRYANT

vs.

HAROLD C. MILLER, d/b/a
CAMP BOWIE PAWN SHOP, and
BUDDY'S HANDYMAN CENTER,
WINN-DIXIE STORES, INC.,
WINN-DIXIE HANDYMAN, INC.,
and WINN-DIXIE TEXAS, INC.

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND AMENDED MOTIONS FOR SUMMARY JUDGMENT AND SEVERANCE OF DEFENDANTS WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. AND WINN-DIXIE TEXAS, INC.

Be it remembered that on the 2nd day of September, 1988, came on to be heard the Motions for Summary Judgment and Amended Motions for Summary Judgment of Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., in the above entitled and numbered cause; and it appearing to the Court that such Motions were duly made in proper form, time and manner, that legal notice thereof had been duly given to the

Plaintiffs for the requisite time period, and that Plaintiffs and Defendants submitted the matter to the Court for review; and it further appearing that such Motions of the Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., were based upon and directed to the pleadings, depositions, affidavits, certified documents and other discovery on file in the records of this cause; and the Court having taken same under advisement and having considered all the motions and pleadings, including, but not limited to, the Plaintiffs' Response to Motions for Summary Judgment and Amended Motions for Summary Judgment of Defendants WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., along with the affidavits and attachments thereto, the Court having overruled the Defendants' objections regarding late filing; the Plaintiffs' Letter Brief dated September 9, 1988; and Defendants WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC.'s Brief in Response to Plaintiffs' Letter Brief, and having reviewed the evidence and the argument of counsel, the Court is of the opinion and does find that the pleadings and the evidence show and reflect the absence of any genuine issue of material fact as regards any cause of action of Plaintiffs, DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT; and the Court does thereupon accordingly find that the Motions for Summary Judgment and the Amended Motions for Summary Judgment of said Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., should be granted upon each and every ground stated in such Motions.

It is therefore, ORDERED, ADJUDGED and DECREED that the Motions for Summary Judgment and Amended Motions for Summary Judgment of Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., are GRANTED upon each

and every ground stated in such Motions; and it further appearing to the Court upon Motion of the Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., that there exists a necessity for the severance of the causes of action stated against Defendants so that the causes of action against said Defendants shall become final; and it further appearing that good cause does exist for such severance;

It is accordingly ORDERED, ADJUDGED and DECREED that the causes of action of Plaintiffs, DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT, as stated against Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., shall be and the same are hereby severed of and from this Cause No. 17-85335-84, which will remain pending as against Defendant HAROLD C. MILLER d/b/a CAMP BOWIE PAWN SHOP, and the Plaintiffs' causes of action against Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC. shall be redocketed as Cause No. 17-117421-88, to be styled DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT vs. WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., so that this Order shall constitute a Final Judgment of Plaintiffs' causes of action against Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., shall be charged to said Defendants and the cost of Court incurred herein by Defendants shall be charged against Plaintiffs, DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT, in the redocketed Cause No. 17-117421-88, styled DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT vs.

WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., for which execution may issue if not paid in due course.

SIGNED this 8th day of December 1988.

/s/ _____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
ART BRENDER

Attorney for Plaintiffs,
Donald Bryant and wife,
Junett Bryant, Individually
and as Next Friend of Dawn
Dee Bryant, a Minor,
and Kirt Bryant

CANTEY & HANGER

By: _____
TOLBERT L.
GREENWOOD

Attorney for Defendants
Winn-Dixie Stores, Inc.,
Winn-Dixie Handyman, Inc.
and Winn-Dixie Texas, Inc.